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No. 06-489

In the Supreme Court of the United States

CARSON CONCRETE CORPORATION
AND CARCO CONSTRUCTION CORPORATION,
PETITIONERS

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly held that the Occupational Safety and Health Review Commission did not abuse its discretion in finding that petitioners' conduct was contumacious and warranted imposition of a default judgment.

2. Whether the court of appeals properly held the Commission's denial of a continuance did not violate petitioners' rights under the Due Process Clause of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-11a) is not published in the *Federal Reporter* but is reprinted in 168 Fed. Appx. 543. The decision and order of the Occupational Safety and Health Review Commission (Pet. App. 14a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2006. A petition for rehearing was denied on June 22, 2006 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on September 19, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. From May 12, 2003, to July 2, 2003, the Occupational Safety and Health Administration (OSHA) inspected a work site of petitioner Carson Concrete Corporation (Carson). On November 7, 2003, the Secretary of Labor issued citations alleging that Carson, a concrete contractor in the construction industry, had engaged in serious, willful, and repeat violations of OSHA safety standards. Pet. App. 4a, 15a, 21a-25a, 29a-30a. The Secretary proposed penalties in the amount of $176,000. *Id.* at 15a.

a. On February 25, 2004, the Secretary served petitioner with 24 requests for admission related to the November citations. Pet. App. 16a. Acting through James Sassaman, the Director of Labor Relations of General Building Contractors Ass'n, Inc., Carson responded to the requests by admitting that the alleged violations of OSHA standards had occurred and by denying that Carson employed the workers in question. *Id.* at 4a, 16a, 19a. On June 29, 2004, the administrative law judge (ALJ) scheduled an evidentiary hearing for November 16, 2004. *Id.* at 4a, 19a. On August 27, 2004, the Secretary moved to have Carson's responses to the requests for admission conclusively established. *Id.* at 19a. On October 5, 2004, the ALJ granted the unopposed motion and preserved for the evidentiary hearing the issue of whether Carson had employed the employees named in the citations. *Ibid.* On October 26, 2004, the ALJ granted the Secretary's unopposed motion to amend the citations to add petitioner Carco Construction Company (Carco) as a charged party. *Ibid.* In subsequent proceedings, Sassaman purported to represent both Carco and Carson. *Id.* at 19a-20a.

b. On November 12, 2004, only four days before the scheduled evidentiary hearing, Sassaman filed a motion to withdraw as petitioners' representative and to request a 30-day continuance for them to obtain a new representative. Pet. App. 5a, 20a. The motion stated that the President and sole corporate officer of Carson, Anthony J. Samango, Jr., (Samango),[1] had disavowed the company's responses to the requests for admission and had ordered Sassaman not to sign the joint pre-hearing statement that the Secretary had submitted to the ALJ on November 5, 2004. *Id.* at 15a, 20a. The Secretary opposed the motion, arguing that petitioners had not demonstrated good cause for the continuance as required by the procedural rules of the Occupational Safety and Health Review Commission (Commission or OSHRC). See 29 C.F.R. 2200.62(a) (providing that an ALJ may postpone a hearing upon the motion of a party "for good cause shown"). By telephonic conference, the ALJ heard the parties' arguments and concluded that petitioners had not shown good cause. Pet. App. 5a, 20a. The ALJ ordered Sassaman to continue representing petitioners and to be present at the scheduled hearing. *Ibid.*

2. Sassaman attended the hearing, as did attorney Peter Leyh, who appeared on behalf of petitioners. Pet. App. 5a, 20a. Leyh moved for reconsideration of the ALJ's denial of the continuance, and he requested a 30-day continuance in order to prepare for the evidentiary hearing. *Ibid.* The Secretary opposed the motion, and the ALJ heard testimony from Samango and Sassaman

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[1] The sole corporate officer of Carco is Samango's son, Anthony J. Samango, III. Pet. App. 15a.

regarding the events that led to the motion of November 12. *Id.* at 5a, 16a-19a, 20a.

Samango testified that, until his meeting with Sassaman on November 5, he was not aware of the Secretary's requests for admission, the motion to admit Carson's responses, or the order granting that motion. Pet. App. at 5a, 17a-18a n.3. In contrast, Sassaman testified that he had kept Samango informed about the case, sent him copies of the requests for admission, discussed the proposed responses to those requests, and provided Samango with copies of all filings and discovery responses. *Id.* at 5a, 17a-19a, 26a-27a.

The ALJ rejected Samango's testimony as "simply not credible." Pet. App. 27a. The ALJ credited Sassaman's version of events, denied petitioners' motion for reconsideration, and ordered the hearing to proceed. *Id.* at 5a, 21a, 26a-27a. Petitioners refused to participate in the hearing and withdrew from the proceedings. *Id.* at 5a, 21a. The Secretary then moved, pursuant to 29 C.F.R. 2200.41(a) (2004),[2] for dismissal of petitioners' Notice of Contest for failure to obey the Commission's rules. Pet. App. 21a.

3. In a decision and order issued January 14, 2005, the ALJ granted the Secretary's motion, vacated the Notice of Contest, and entered a default judgment against respondents for $176,000. Pet. App. at 5a-6a, 29a-30a. The ALJ explained that petitioners had not demonstrated good cause for a continuance and had "failed . . . to proceed . . . as required by the . . . Judge."

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[2] After the hearing in this case, 29 C.F.R. 2200.41 (2004) was redesignated without substantive changes as 29 C.F.R. 2200.101. See *Revisions to Procedural Rules Governing Practice Before the Occupational Safety and Health Review Commission*, 70 Fed. Reg. 22,788, 22,790 (2005).

See *id.* at 28a (quoting 29 C.F.R. 2200.41(a) (2004)). This failure allowed the ALJ to enter judgment against petitioners under Commission Rule 41(a) (29 C.F.R. 2200.41(a) (2004)). Pet. App. 28a. The ALJ recognized that the entry of a default judgment was "extreme" and that Commission precedent required a demonstration of either prejudice or contumacious conduct to support entry of such a judgment. *Ibid.*

The ALJ determined that the "belated request for a continuance was contumacious." Pet. App. 28a. He found that (1) Samango was aware of the strategy to limit Carson's defense to the claim that Carson did not employ the individuals in question before the November meeting with Sassaman, and (2) Samango's contrary testimony at the hearing "constitute[d] an expression of contempt for [the OSHA] process." *Id.* at 29a; see *id.* at 5a. Additionally, the ALJ determined that a continuance would potentially prejudice the Secretary's case, "inappropriately require the Secretary to expend additional time and resources in the litigation of th[e] matter," and "encourage future misconduct." *Id.* at 29a. The ALJ therefore granted the Secretary's motion to dismiss the Notice of Contest and entered a default judgment against petitioners. *Id.* at 27a, 29a.

4. Carson filed a petition with the Commission for discretionary review of the ALJ's order. The Commission did not direct the case for review, and the ALJ's decision became the Commission's final order. Pet. App. 12a-13a.

5. Petitioners sought review in the court of appeals, which affirmed the Commission's order in an unpublished opinion. Pet. App. 3a-11a. The court of appeals accepted the ALJ's credibility determinations and the resulting inference that Samango was aware of the ad-

missions well in advance of the November 5 meeting with Sassaman. *Id.* at 8a. The court of appeals held that the ALJ did not abuse his discretion in determining there was not good cause for a continuance that would necessitate additional discovery and potentially prejudice the Secretary's case. See *id.* at 7a-9a; *Fitzhugh* v. *DEA*, 813 F.2d 1248, 1252 (D.C. Cir. 1987) (explaining that ALJ's denial of a continuance will not be overturned absent clear showing of abuse of discretion). The court of appeals also rejected petitioners' claim that the denial of a continuance violated their right to due process, reasoning that petitioners were "afforded an opportunity to be heard at a meaningful time and in a meaningful manner" and were "represented by counsel of [their] choice." Pet. App. at 9a (internal quotation marks and citation omitted).

Additionally, the court of appeals rejected petitioners' contention that the ALJ abused his discretion by entering the default judgment. Pet. App. 9a-10a. The court of appeals concluded that it was within the ALJ's discretion to determine that Samango's false testimony and failure to disavow the company's admissions in the months prior to the scheduled hearing was "an attempt to delay proceedings and expand the scope of contested issues and was, therefore, contumacious." *Id.* at 10a. The court of appeals similarly rejected petitioners' claim that the ALJ erred by failing to consider lesser sanctions. It "question[ed] whether this claim was properly preserved for review on appeal" and noted that "an ALJ is not required to consider lesser sanctions where a litigant refuses to participate in a scheduled evidentiary hearing." *Id.* at 10a n.7.

ARGUMENT

1. Petitioner first contends (Pet. 7-10) that the court of appeals' decision affirming a default judgment where the ALJ did not consider lesser sanctions conflicts with case law from that court and the other courts of appeals. Petitioner is mistaken. This Court and the courts of appeals have recognized that, based upon a party's bad-faith conduct, dismissal may be an appropriate exercise of discretion even where the district court has not considered lesser sanctions. See *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (per curiam) (reversing court of appeals' reversal of dismissal even where court of appeals had concluded, *In re Professional Hockey Antitrust Litigation*, 531 F.2d 1188, 1192 (3d Cir. 1976), that "it is incumbent on the court * * * to review the possible use of an alternate sanction before it imposes the stringent sanction of dismissal," and nothing "in the district court's opinion indicates that it in fact considered an alternative sanction"); *Knoll* v. *AT&T*, 176 F.3d 359, 366 (6th Cir. 1999) (affirming dismissal and explaining that "[c]onsideration of lesser sanctions would seem particularly superfluous under circumstances * * * where counsel inexcusably has failed to prepare and then refused to proceed at the time scheduled for trial"); see generally *Link* v. *Wabash R.R.*, 370 U.S. 626, 633 (1962) (explaining that, in certain circumstances, "a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing"); cf. *Admark Jewelry Corp.* v. *United Parcel Serv.*, 31 Fed. Appx. 62, 63 (3d Cir. 2002) (affirming dismissal where district court warned plaintiff that no continuance would be granted based on plaintiff's belated

effort to replace his counsel, and plaintiff nonetheless appeared at trial with new counsel demanding a continuance); *Moffitt* v. *Illinois State Bd. of Educ.*, 236 F.3d 868, 873 (7th Cir. 2001) (affirming dismissal and noting that "it is not unreasonable to treat a failure to attend trial more severely than a failure to comply with discovery orders in a timely fashion") (citation omitted).

The cases cited by petitioners (Pet. 7-8) are not to the contrary. None involved the entry of a default order by an ALJ, who has a "limited number of sanctions" at his disposal. *Secretary of Labor* v. *Philadelphia Constr. Equip., Inc.*, OSHRC No. 92-899, 1993 WL 127953, at *3 (Apr. 22, 1993). Unlike a district court, an ALJ has no power to hold a party in contempt, see *Secretary of Labor* v. *Chartwell Corp.*, OSHRC No. 91-2097, 1992 WL 224826, at *3 (Aug. 28, 1992), and no authority to "award costs and attorney's fees against a dilatory party." *Secretary of Labor* v. *Duquesne Light Co.*, OSHRC No. 78-5034, 1980 WL 10771, at *2 n.8 (Apr. 16, 1980). Unsurprisingly, therefore, the Commission's rules provide that an entry of default is an appropriate sanction when a party "has failed to plead or otherwise proceed as provided by [Commission] rules or as required by the * * * Judge." 29 C.F.R. 2200.101(a).

Furthermore, none of the cases cited by petitioners involved contumacious conduct like petitioners' refusal to participate in a scheduled hearing. See *Adams* v. *Trustees of the N.J. Brewery Employees' Pension Trust Fund*, 29 F.3d 863, 878 (3d Cir. 1994) (noting "lack of willfulness or bad faith on the part of the [party]"); *Jackson* v. *City of N.Y.*, 22 F.3d 71, 75 (2d Cir. 1994) (finding "no instance on the record in which the delays were caused solely by the actions of [plaintiff] or her attorney"); *Berry* v. *CIGNA/RSI-CIGNA*, 975 F.2d

1188, 1192 (5th Cir. 1992) (explaining that plaintiff's actions "d[id] not amount to a clear record of delay or contumacious conduct"); *McNeal* v. *Papasan*, 842 F.2d 787, 793 (5th Cir. 1988) (ruling record did not provide sufficient evidence for court of appeals to conclude conduct was "contumacious"); *Emcasco Ins. Co.* v. *Sambrick*, 834 F.2d 71, 75 (3d Cir. 1987) (noting that defendant's "conduct did not evince flagrant bad faith") (internal quotation marks omitted); *Cohen* v. *Carnival Cruise Lines, Inc.*, 782 F.2d 923, 925 (11th Cir. 1986) (finding "no clear record of delay or willful contempt"); *Titus* v. *Mercedes Benz of N. Am.*, 695 F.2d 746, 750-751 (3d Cir. 1982) (noting it was unclear whether appellant's failure to act provided "a record of dilatory proceeding or contumacious conduct"). In short, the court of appeals' decision in this case is consistent with decisions of this Court, the other courts of appeals, and the Commission, and it does not warrant further review.

2. Nor is there any merit to petitioners' claim (Pet. 10-13) that the denial of the continuance violated their due process rights. As the court of appeals recognized (Pet. App. 9a), due process requires that civil litigants be afforded notice and a meaningful opportunity to be heard. See *LaChance* v. *Erickson*, 522 U.S. 262, 266 (1998). But litigants may forfeit, through their own misconduct, the right to avail themselves of certain procedures. See *Boddie* v. *Connecticut*, 401 U.S. 371, 378 (1971) (explaining that a state court can "enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, * * * or who, without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication").

Petitioners were afforded the opportunity for a full evidentiary hearing and employed the representative of their choice in order to respond to the Secretary's requests for admission. They chose to wait until shortly before the hearing to change representatives and then refused to participate. The court of appeals correctly determined that their due process rights were not infringed. Pet. App. 9a.

3. Finally, petitioners seek review on the ground that their withdrawal from the hearing "did not constitute contumacious behavior." Pet. 13. That claim does not merit further review. Although petitioners suggest that the ALJ could not make a finding of contumaciousness based upon a single dilatory act, the ALJ actually based its finding upon the pattern of misconduct in which petitioners engaged.[3] See Pet. 13-14. First, Samango attempted to disavow Carson's established admissions only four days before the hearing, despite his longstanding knowledge of the admissions his company had made. Pet. App. 10a. Next, Samango falsely testified before the ALJ, demonstrating his "contempt for [the OSHA] process." *Id.* at 29a; see *id.* at 10a. Finally, after the ALJ denied petitioners' request for a continuance, they refused to proceed with the hearing as the ALJ ordered and instead withdrew from the proceed-

[3] Even if petitioners had engaged only in one dilatory act, the cases they cite would not require reversal of the ALJ's finding. In *Gardner* v. *United States*, 211 F.3d 1305, 1308 (D.C. Cir. 2000), cert. denied, 531 U.S. 1114 (2001), the court of appeals reviewed the decision of a district court, not an ALJ, and there was no evidence that the delaying party deliberately waited for months to object to a scheduled proceeding. Similarly, in *Secretary of Labor* v. *Texas Masonry, Inc.*, OSHRC No. 82-955, 1984 WL 34800, at *2 (Feb. 24, 1984), the Secretary's delay did not arise "from any desire to deliberately delay the proceedings," as the ALJ found in this case.

ings. *Ibid.* There is no reason for this Court to review this fact-bound issue. See Sup. Ct. R. 10. The court of appeals properly affirmed the ALJ's findings and correctly concluded that he did not abuse his discretion in determining that petitioner's course of conduct was contumacious. Pet. App. at 8a, 9a-10a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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